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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974
No. 74-1050

MARVIN A. LICHTIG and
SOLOMON BLOCK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SANDS & MARKOWITZ
6420 Wilshire Boulevard
Los Angeles, CA 90048
(213) 658-6800

Attorneys for
Solomon Block

LAW OFFICES OF
RICHARD A. DeSANTIS
1901 Avenue of the Stars
Los Angeles, CA 90067
(213) 553-1600

Attorneys for
Marvin A. Lichtig

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TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The Petitioners, Marvin A. Lichtig, and Solomon Block, respectfully pray that a Writ of Certiorari issue to review the denial by the United States Court of Appeals for the Ninth Circuit of a Writ of Mandate and a Writ of Prohibition in this case.

CITATIONS TO OPINIONS BELOW

The Order of the Court of Appeals is attached hereto as Appendix A and no opinion was rendered by this Court. The Order of the United States District Court for the Central District of California is not yet reported and no opinion was rendered by this Court.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit was entered on January 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the widespread adverse publicity of the Equity Funding scandal required that the District Court, upon timely Motion, grant a change of venue, or in the alternative, an indefinite continuance of the trial.

STATEMENT OF THE CASE

In November of 1973, the United States Attorney for the Central District of California filed a 105 count indictment against former executives and employees of the Equity Funding Corporation of America and against that company's independent auditors, the petitioners herein. The local media has carefully followed the progress of that prosecution. Interest has been fanned by the intermittent pleas of guilty by the various corporate officers including capitulation of one of them on the eve of trial and the equally dramatic plea by the president of the company after one week of trial.

In addition to the criminal proceedings a proliferation of civil suits arose from the same fact situation and these suits were ordered coordinated in the United States District Court for the Central District of California pursuant to the order of the Panel on Multidistrict Litigation. At the first pretrial hearing the leading counsel for the plaintiffs stated that in the civil litigation the accountants were the target group. The media in its reporting of the civil litigation has frequently

drawn the attention of the public to the fact that the independent auditors were also subject to prosecution in the criminal matters which were also extensively reported by the media. Although initially abated, civil discovery is now proceeding in the civil matter and it is reasonable to assume that all discovery relating to the "fraud" will occur in Los Angeles.

On December 20, 1974, the Petitioners filed with the United States District Court, Central District of California, their timely motion for change of venue or, in the alternative, for an indefinite continuance. All the motions came on to be heard by the Court on January 6, 1975 and were denied.

On January 7, 1975, a jury trial commenced before the Honorable Jesse W. Curtis in the United States District Court for the Central District of California.

On January 14, 1975, the Petitioners presented their emergency motions for stay of trial and their Petitions for Writ of Mandate or Prohibition for Stay of Trial

Pending Hearing before the United States Court of Appeals for the Ninth Circuit. The Court of Appeals denied the Petitioners' Motions and Petitions on January 22, 1975 and a true copy of the said Order of the Court denying the Writs and Motion is appended and attached hereto as Appendix A.

STATEMENT OF THE FACTS

More than 200 articles from fourteen different newspapers and magazines have been written in regard to the matter that has become known as the "Equity Funding scandal". In addition, numerous radio and television broadcasts were made in regard to various aspects of the "scandal". The publicity in connection with the case presumes, for the most part, that the guilt of the Petitioners is a basic premise and has been established.

On April 3, 1973, the Los Angeles Times carried an article discussing a series of civil actions brought against the accountants in which it was implied that "the accountants either wilfully or negligently failed to exercise reasonable

care."

The national newspaper Barron's, in its April 16, 1973 edition, noted that because of the "reams of newspaper copy engulfing the company, the noun ('scandal') is invariably riveted to the corporate title", and the newspaper suggested that the company should change its name to Equity Funding Scandal.

On April 25, 1973, the Los Angeles Times stated that John Newman, of the United States Attorney's office, had told them that criminal investigation of the Equity Funding activities was in progress and the newspaper headlined this article "Investigators Turn Eye on Independent Auditors for Equity" confirming that the United States Attorney was in fact conducting an intensive investigation because of "massive discrepancies in the firm's financial accounting". The newspaper further indicated that all of the officials of various state and federal agencies were "known to be wondering how the outside auditing firms . . . could have missed such an obvious attempt . . . to inflate Equity Funding's assets and

earnings."

On May 2, 1973, the Herald Examiner, another major Los Angeles newspaper, indicated that the general public was concerned and had difficulty in understanding why the independent accounting firms that had employed the Petitioners had failed to discover the various irregularities in the company.

On May 4, 1973, the Wall Street Journal in a two-page article implied that the auditors, including all the Petitioners, were on "cozy" terms with the corporate officials of Equity Funding Corporation. The newspaper also implied that because the Equity Funding Corporation was a major client of the independent auditing firm to which the defendants belonged that the independent auditing firm would have had an interest in covering up the scandal or in failing to uncover irregularities in the operation of the company. The Journal also implied that because one of the Petitioners was not a Certified Public Accountant during the auditing of Equity Funding, that the auditors and the accounting firm acted

improperly in assigning him to this audit.

The Los Angeles Herald Examiner reported on May 31, 1973 that the United States Attorney William D. Keller had issued a statement to the press in which he denied a charge by the Illinois regulatory authorities that the United States Attorney's office in Los Angeles was not proceeding in a rapid manner in the investigation of the Equity Funding Corporation. The United States Attorney also stated that his release that the center of all the Equity Funding activities was in Los Angeles area.

In October 18, 1973, the Wall Street Journal in a news article disclosed that the Petitioners had resigned from their accounting firm and that their resignations had been under a cloud of charges and implied wrongdoing involved in the "scandal ridden Equity Funding matter".

On November 2, 1973, the Los Angeles Times carried an extensive article announcing the indictment of 22 persons in the "mammoth Equity Funding fraud case" and discussed the involvement of the Petitioners in the "scandal" which it

describes as having "repercussions [that] rattled the entire U. S. business community".

The Herald Examiner on November 2, 1973 also reported on the indictment stating the accountants "were charged with intentionally conducting incomplete and insufficient audits".

On October 3, 1974, the Wall Street Journal and the Pasadena Star News printed articles in which they quoted Assistant United States Attorney, John M. Newman, Jr., as stating that the Equity Funding case was a "fraud of classic proportions".

On October 23, 1974, the Wall Street Journal carried an article about the civil litigation in which it stated that one of the Petitioners was an "incompetent and (an) impulsive gambler who had previously been unable to hold a position with other firms for any length of time".

On November 4, 1974, the Wall Street Journal carried an article in which the trustee in bankruptcy for the Equity Funding Corporation was quoted as having stated that "There is strong evidence

that several of the accountants . . . were aware of or suspected of the fraud and cooperated in its concealment".

In New York magazine, on November 18, 1974, an article by economist John Kenneth Galbraith entitled "Vesco, The Joy of Swindling" cited the Equity Funding case and added that the case involved "a good deal of creative accounting. In recent years accountants have become very cooperative and have much to answer for."

The Petitioners were independent auditors and not on the payroll of the Equity Funding Corporation, whose officers have already pleaded guilty to one or more charges brought against them in a separate criminal trial. However, the media in its presentation in the more than 200 articles which have been published locally or on a nationwide basis about the case has at numerous times implied that the accountants were not independent agents and were, in fact, on the company payroll by virtue of asserted gratuities as expressed, for example, by the Wall Street Journal when it used the term "cozy" relationships with the

corporate officers. Although some of the newspaper and magazine articles indicate that the accountants were indeed independent accountants and auditors outside the corporation, the publicity around the scandal is such that the public from which the jury was drawn has become confused as to whether the accountants were in fact subordinates or lieutenants acting under the orders of the corporate officers who have now pleaded guilty to various charges brought against them in the original indictment.

The Petitioners timely made a motion for change of venue, or in the alternative, for a continuance based on this extensive publicity which is prejudicial to the Petitioners and that motion was denied by the District Court on January 6, 1975.

On January 7, 1975 the Petitioners commenced trial before the Honorable Jesse W. Curtis and a jury in the United States District Court for the Central District of California.

On January 14, 1975, Petitioners presented a Petition for a Writ of Mandate and/or Prohibition to the United States Court of Appeals for the Ninth Circuit by way of review of the denial of the Petitioners' Motion for Change of Venue and/or for an indefinite Continuance by the District Court.

On January 22, 1975, the Court of Appeals denied the Petition for Writ of Prohibition and/or Mandate.

The publicity surrounding the Petitioners has continued unabated since the commencement of their trial. On January 8, 1975, the Wall Street Journal carried an extensive article about the Petitioners in which the newspaper stated that "Public accountants tend to write off Equity Funding's main auditors as grossly incompetent at best. The prevailing opinion among accountants is that a decent audit would have exposed the fraud . . . ."

The Journal also stated "The question of whether accounting procedures or the accountants themselves were at fault is now getting, in part at least, a legal

test." This refers to the fact that many of the newspaper articles imply that the real motive underlying the criminal action brought against the Petitioners is an attempt by the Government to discipline or frighten the accounting profession rather than because the Government believes that it has a genuine criminal case against the Petitioners.

In support of their petition for a writ of prohibition and/or mandate the petitioners engaged the services of Arthur J. Shaw & Co., one of the leading specialists in the conduct and interpretation of public opinion surveys in California. The consulting firm conducted a survey in the Los Angeles area designed to determine the attitude of the general public toward the Equity Funding "scandal," and toward independent accountants. The survey was also designed to elicit any significant religious or ethnic bias among the general public directed toward persons indicted in the Equity Funding criminal and civil cases.

The public opinion survey revealed a very high public awareness of an interest

in the Equity Funding cases. The consulting firm also reported that a high percentage of persons interviewed had formed definite opinions about the financial operations of Equity Funding Corporation of America and the accuracy of the company's financial statements.

The survey indicated that there was a statistically significant probability that a number of jurors in the criminal case had strong views about the Equity Funding Scandal and about the role of the independent auditors that could not be elicited on voir dire.

REASONS FOR GRANTING THE WRIT

A fair and just trial cannot be had in the Central District of California because of pervasive adverse publicity from which prejudice is presumed.

DISCUSSION

A crucial issue at trial is whether the auditors knew the facts and circumstances which would have given them knowledge of the fraud. The magnitude of the publicity which has retrospectively simplfied the fraud and the substantial local interest prevents the defense from receiving a fair trial in the Central District of California.

Review of the newspaper and magazine articles reveals that the publicity complained of by the Petitioners and their Motion for Change of Venue or, in the Alternative, for a Continuance, before the District Court based upon prejudicial pretrial publicity, is so pervasive, widespread, and prejudicial as to render it currently impossible to select a jury which would render a fair, just, and impartial verdict.

ARGUMENT

I

PREJUDICE IS PRESUMED WHERE ADVERSE PUBLICITY IS PERVASIVE

Where a defendant's constitutional right to a fair trial is threatened by the onslaught of substantial and repeated pretrial publicity, it is appropriate that the Court change venue to another jurisdiction untainted by massive and pervasive prejudicial publicity. Dennis v. United States, 302 F.2d 5 (1962). The repeated hammering of publicity regarding the Equity Funding scandal is particularly significant because of the local sensitivity to the repeated violation of Los

Angeles' civic honor by a multitude of bogus operations. The flames of this local prejudice were fanned by William B. Keller, United States Attorney for the Central District of California, when on November 1, 1973, he stated: "This type of crime is epidemic in this Country..." The plethora of prejudicial publicity is documented in the material lodged with the Court and amply supports the contentions of defendants Solomon Block and Marvin A. Lichtig that it is impossible for them to secure a fair trial in the Central District of California.

In Sheppard v. Maxwell, 384 U.S. 333 (1965), the Supreme Court, after an exhaustive review of its relevant prior decisions, set forth the basic legal principles by which this Motion must be determined. The court, in reviewing its previous opinions, held in Sheppard:

> "But the Court has also pointed out that '[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' Bridges v. California, supra, at 271. And

the Court has insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.' Chambers v. Florida, 309 U.S. 227, 236-237 (1940) 'Freedom of discussions should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.' Pennekamp v. Florida, 328 U.S. 331, 347 (1946). But it must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of courtroom according to legal procedures.' Cox v. Louisiana, 379 U.S. 559, 583 (1965) (Black, J., dissenting). Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court not from outside

sources. Thus, in Marshall v. United States, 360 U.S. 310(1959), we set aside a federal conviction where the jurors were exposed 'through news accounts' to information that was not admitted at trial. We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' at 313. At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles, that he could decide the case only on the evidence of record and that he felt no prejudice against petitioner as a result of the articles.' at 312. Likewise, in Irvin v. Dowd, 366 U.S. 717 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside

the conviction holding:

> 'with his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion. . .' at 728.

"The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in Patterson v. Colorado, 205 U.S. 454, 462 (1907):

> 'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'

"Only last Term in Estes v. Texas, 381 U.S. 532(1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:

> 'It is true that in most cases

> involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process.' at 542-543.
>
> "And we cited with approval the language of Mr. Justice Black for the Court in In re Murchison, 349 U.S. 133, 136(1955), that 'our system of law has always endeavored to prevent even the probability of unfairness.'"
>
> Sheppard, supra, at 350-352.

With evidence of massive and pervasive publicity, it is the duty of this Honorable Court to be vigilant in correcting the abuse. Indeed, this Honorable Court should be mindful of the caution of the Court in Delaney v. United States, 199 F.2d 107 (1st Cir. 1952) 112-113:

"One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity."

Here the fact that the prospective venire has been bathed in streams of circumstantial incriminations flowing from the news media which prevents the defendants from being afforded a fair trial in the Central District cannot be ignored.

II

VOIR DIRE OF A PROSPECTIVE VENIRE CANNOT INSURE A FAIR TRIAL

The apparent ability to empanel a jury cannot be relied upon to establish a trial will be fair. In Delaney v. United States, supra, at 112-113:

"No doubt the district judge conscientiously did all he could,

both in questions he addressed to the jurors at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this damaging publicity, and to assure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. But as stated by Mr. Justice Jackson, concurring, in Krulewitch v. United States, 1949, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction.' And see Note, Controlling Press and Radio Influence on Trials, 63 Har. L.Rev. 840, 842-43 (1950). One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the

unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity. This is particularly true in the determination of issues involving the credibility of witnesses."

The experience of time and recognition of human nature has caused the courts to view with suspicion the ability of voir dire of veniremen to sift out prejudice in communities saturated with pretrial publicity. In Sheppard, the Supreme Court held flatly and specifically that prejudice is presumed where community exposure to adverse publicity is "repeated and in depth" and that a juror's voir dire denial of prejudice therefore cannot be accepted in such circumstances. Nor can the court measure the life span of prejudicial taint. In Stroble v. California, 343 U.S. 181, 201 (1952), the Court stated that:

"Science in all its advances has not given us instruments for determining when the impact of such newspaper exploitation has spent

itself or whether the powerful impression bound to be made by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror by the tame and often pedestrian proceedings in Court."

Therefore, the Central District of California which has been infected with intense, continuous and highly prejudicial publicity of overwhelming local interest is not the appropriate forum in which the Petitioners can be judged by a detached and impartial trier of fact.

III

THE MOTION FOR CHANGE OF VENUE SHOULD HAVE BEEN HEARD BEFORE ATTEMPTING TO SELECT A JURY

The decision in Sheppard generated substantial study of the problems raised by our allegiance to the sometimes antagonistic traditions of both a free press and a fair trial. Standards subsequently were issued by the American Bar Association. Section 3.2(d) of those Standards states:

"If a motion for a change of venue or continuance is made prior to the impaneling of the jury, the motion shall be disposed of before impaneling."

The Commentary on this Section follows:

"Subsection (d) deals with the relationship between a motion for continuance or change of venue and the process of jury selection. It has in many jurisdictions been common practice for denial of such a motion to be sustained if a jury meeting prevailing standard could be obtained. There are two principal difficulties with this approach. First, many existing standards of acceptability tolerate considerable knowledge of the case and even an opinion on the merits on the prospective juror. And even under a more restrictive standard, there will remain the problem of obtaining accurate answers on voir dire -- is the juror consciously or subconsciously

harboring prejudice against the accused resulting from widespread news coverage in the community? Thus, if change of venue and continuance are to be of value, they should not turn on the results of the voir dire; rather they should constitute independent remedies designed to assure fair trial when news coverage has raised substantial doubts about the effectiveness of the voir dire standing alone.

"The second difficulty is that when disposition of a motion for change of venue or continuance turns on the results of the voir dire, defense counsel may be placed in an extremely difficult position. Knowing conditions in the community, he may be more inclined to accept a particular juror, even one who has expressed an opinion, than to take his chances with other, less desirable jurors who may be waiting in the wings. And yet to make an adequate record for appellate

> review, he must object to as much as possible, and use up his peremptory challenge as well. This dilemma seems both unnecessary and undesirable. 'The Committee therefore proposes in subsection (d) that when a motion for change of venue or continuance is made prior to the impaneling of the jury, it shall be disposed of before impaneling. And if it is renewed after impaneling, the fact that a jury meeting prevailing standards has been obtained shall not be regarded as determinative.'"

Clearly where prejudicial publicity has been injected into jurors consciousness, the courts do not give dispositive effect to jurors' assurances of impartiality. See Irwin v. Dowd, 366 U.S. 717 (1961). An individual may be completely yet unconsciously bent to the influence of initial impressions gained from the news media. In the words of Alexander Pope, "All looks yellow to the jaundiced eye." Where it is not a reliable practice to expect a venireman to confess

prejudice, there can be no justification for attempting to select a jury prior to ruling on a motion to change venue.

IV

THE WIDESPREAD LOCAL PUBLICITY HAS DEPRIVED THE DEFENDANTS OF A FAIR CROSS-SECTION OF THE LOCAL COMMUNITY FROM WHICH TO SELECT THEIR JURY

It is axiomatic that a defendant in a criminal case is entitled as a matter of constitutional right, not only to a fair jury, but a fair jury drawn from a representative cross-section of the community. The Congress itself has stated, as its "declaration of policy" in this regard:

> "It is the policy of the United States that all litigants in federal courts entitled to a trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division where the court convenes."
>
> 28 U.S.C. 1861 [Emphasis added].

This Congressional declaration merely reflects "the established tradition in the use of juries as instruments of public justice that the juries be a body truly representative of the community." Smith v. Texas, 311 U.S. 128, 130 (1940). See also, Swain v. Alabama, 380 U.S. 202 (1965); Cassell v. Texas, 339 U.S. 282 (1950); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Atkins v. Texas, 325 U.S. 398 (1945).

This basic American principle has been implemented in any number of cases not limited to racial or ethnic considerations. The exclusion of women has been held to be unconstitutional. Ballard v. United States, 329 U.S. 187 (1946). The exclusion of persons who work for a daily wage has been forbidden. Thiel v. Southern Pacific Co., supra. The exclusion of persons who do not believe in capital punishment has been prohibited. Witherspoon v. Illinois, 391 U.S. 510 (1968). In short, "cross-section" has come to mean precisely what the words imply, namely, citizens who represent all portions of the community in which the

trial is conducted. As Mr. Justice Douglas reiterated in concurring opinion in the Witherspoon case, Id., 391 U.S. at 524:

> "There is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons. Nor is there any right to a jury chosen solely from those at the lower end of the economic and social scale. But there is a constitutional right to a jury drawn from a group which represent a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, or of the least intelligent, the least wealthy, or the least successful. It is a democratic institution, representative of

all qualified classes of people."

State courts, to which lesser standards of due process apply, have similarly valued a defendant's right to a fair-minded jury selected from a fair cross-section of the community. In Magness v. State, 60 So. 8, 10 (Miss. 1912) the Supreme Court of Mississippi stated:

> "The requirement of the law is not satisfied by the mere impaneling of 12 men against whom no legal complaint can be made. The defendant is entitled to be tried in a county where a fair proportion of the people qualified for jury service may be used as a venire from which a jury may be secured to try his case fairly and impartially, and uninfluenced by a preponderant sentiment that he should be flung to the lions."

V

PETITIONERS' MOTION FOR CHANGE OF VENUE FROM THE CENTRAL DISTRICT SHOULD HAVE BEEN GRANTED

As a matter of law, Petitioners' Motion for Change of Venue should have been granted under the circumstances presented. In the Sheppard case, the Supreme Court held flatly, 384 U.S. at 363:

> "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." [Emphasis added]

Precisely these remedies also have been recommended by the Federal Judicial Committee on the Operation of the Jury System, chaired by Chief Judge Irving B. Kaufman. In its report on the issues raised by the Sheppard case, that Committee specifically recommended that federal courts "in criminal cases likely to

attract substantial public interest . . . make more extensive use of existing techniques designed to ensure an impartial jury." Change of venue and continuance were the first of those techniques recommended by the Committee. Free Press - Fair Trial, 45 F.R.D. 391, 412 (1968). In the Ninth Circuit it was held in Silverthorne v. United States, 400 F.2d 627 that:

> "Discretion is not a substitute for duty . . . [W]here pre-trial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of an accused."

While this Honorable Court is not bound by decisions of the Supreme Court of the State of California, the Court should be mindful that Mapp v. Ohio, 367 U.S. 643 (1961) followed People v. Cahan, 44 Cal.2d 434 (1955), and Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966) followed People v. Dorado, 62 Cal.2d 338 (1966).

Relying on Sheppard, in Maine v. Superior Court, 68 Cal.2d 375 (1968), the California Supreme Court accepted the American Bar Association's proposed standards on pretrial publicity, infra.

> "In many cases that are the focus of unusual public attention, the effect of prejudicial pretrial disclosure and widespread community antagonism, can usually be overcome by a change of venue."
>
> . . .
>
> "[It] shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination can be based on such evidence as qualified public opinion surveys, or opinion testimony offered by individuals or on the Court's own evaluation of the nature, frequency, and timing of the material involved. The showing of actual prejudice shall

not be required."

Therefore, under this test it is clear that venue must be changed to a district "not so permeated with publicity". The media reports on Equity Funding unquestionably have been far greater and of more significant local interest in Los Angeles than any other federal district in the United States.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

NATHAN MARKOWITZ

Attorney for Petitioner
Solomon Block

RICHARD A. DeSANTIS

Attorney for Petitioner
Marvin A. Lichtig

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOLOMON BLOCK and MARVIN L. LICHTIG, Petitioners, vs. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, UNITED STATES OF AMERICA, Real Party in Interest.	FILED Jan 22 1975 U.S.Court of Appeals Docketed Jan 24 1975 No. 75-1122 O R D E R Received Jan 31 1975

Before: KOELSCH and WRIGHT,
Circuit Judges

Upon due consideration, the petition for writ of prohibition filed herein January 14, 1975 is hereby denied.

Koelsch

/S/ Eugene A. Wright
U. S. Circuit Judges

Mo Cal 1/20/75

In the Supreme Court of the United States

OCTOBER Term, 1974

No. 74-1050

MARVIN A. LICHTIG and SOLOMON BLOCK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that a writ of mandamus should issue to require the district court to grant their motion for a change of venue in a trial that commenced on January 7, 1975.

Petitioners were the independent auditors of Equity Funding Corporation. Along with twenty co-defendants, they were indicted in the United States District Court for the Central District of California for various offenses allegedly committed in connection with the activities of that corporation that gave rise to the so-called "Equity Funding scandal."[1]

[1]Nineteen of petitioners' co-defendants have now entered pleas of guilty to one or more counts of the indictment.

Petitioners' trial was scheduled to begin on January 7, 1975. On the day before trial was to begin, petitioners brought a motion for change of venue or, in the alternative, for an indefinite continuance, on the ground of allegedly prejudicial pretrial publicity. The motion was denied; the trial commenced as scheduled and is still continuing.

One week after commencement of the trial, petitioners filed a petition for a writ of mandamus or prohibition in the United States Court of Appeals for the Ninth Circuit, requesting that the district court be ordered to terminate the trial proceedings by granting the motion for change of venue or, in the alternative, for an indefinite continuance. The petition was summarily denied (Pet. App.).

The denial of the petition for a writ of mandamus or prohibition was proper. Such writs "are drastic and extraordinary remedies * * * [that] should be resorted to only where appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259-260. Normal appellate review will remain available if petitioners are in fact convicted at trial. See, *e.g.*, *United States* v. *Phillips*, 433 F.2d 1364 (C.A. 8), certiorari denied, 401 U.S. 917; *Bostick* v. *United States*, 400 F.2d 449 (C.A. 5), certiorari denied, 393 U.S. 1068. Accordingly, the court of appeals correctly rebuffed petitioners' attempt to gain piecemeal review. As the Court said in *Will* v. *United States*, 389 U.S. 90, 96, "[a]ll our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court." See, also, *United States Alkali Association* v. *United States*, 325 U.S. 196, 202; *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-383. Moreover, issuance of an extraordinary writ would be particularly inappropriate here, where, because of petitioners' decision to delay bringing their mo-

tion for change of venue until the day preceding trial, issuance of the writ would necessarily interfere with the conduct of a trial in which petitioners may in fact be acquitted.

Furthermore, the extraordinary relief petitioners request is not available in cases, such as this, where "the most that can be claimed * * * is that [the district judge] may have erred in ruling on matters within his jurisdiction." *Will* v. *United States, supra*, 389 U.S. at 103-104. See, also, *Parr* v. *United States*, 351 U.S. 513, 520.

In any event, petitioners' underlying claim of prejudicial pretrial publicity is insubstantial. We have been informed by the United States Attorney for the Central District of California that the *voir dire* panel sitting for petitioners' trial consists exclusively of individuals who had not, prior to trial, heard anything concerning either petitioners or the Equity Funding Corporation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.